

Running head title: Family violence laws and lesbian relationships

**Family violence laws: traditional narratives and the (in)visibility of lesbian relationships
and lesbian parented families**

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Abstract

Feminist advocacy and activism over the last 40 years broke historic ground in shining a light on ‘domestic’ or ‘family’ violence, traditionally conceptualized as male violence against female intimate partners and their children. This has resulted in a large body of research, particularly in the United States, United Kingdom, Australia and similar jurisdictions, around the gendered nature of family violence and violence within heterosexual relationships and heterosexual-parented families. As a consequence, the predominant narrative – in political, policy and advocacy settings – is largely heteronormative. Less research has focused on family violence in non-heterosexual relationships. The data that do exist have employed different methodological approaches and there are limitations on the extent to which they can be compared to the data on violence within heterosexual relationships. However, the existing research does demonstrate that family violence within lesbian, gay, bisexual, transgender, and intersex (LGBTI) communities is a significant issue. Even so, the current narrative does not acknowledge this and predominantly reflects heterosexual norms of intimate relationships and family structures in society. LGBTI relationships are described as ‘invisible’ in policy and practice responses to family violence, due to the failure to acknowledge violence in such communities. This article explores these claims in relation to lesbian relationships in the context of Australian legislative responses to family violence. It considers the extent to which family violence laws in two Australian jurisdictions recognize and frame lesbian identity in intimate relationships and lesbian-parented families. This is considered in light of the emerging conceptualization of family violence in lesbian relationships and lesbian-parented families, as evidenced by the wider scholarly literature on the nature and dynamics of such violence.

From the private to the public: recognition of family violence

Family violence – violence perpetrated within ‘intimate,’ ‘family’ and ‘domestic’ relationships and settings – causes significant harm to people who are targets of or witnesses to abuse, as well as a “heavy and wide-ranging” burden to the community as a whole.¹

Family violence breaches both the sanctity of the home as a place of safety and the trust and the vulnerability inherent in intimate and family relationships. It has wrongs that are ‘peculiar to it.’² Family violence is commonly understood to encompass a wide range of violent, threatening, or controlling behaviors committed by one person towards a current or former partner, a family member, or any other person in a family-like relationship.³ The violence need not fulfil a traditional understanding of violence (e.g. a physical assault), but can include a wide range of physical, sexual, emotional, financial (or economic), social, and psychological abuse. This is commonly perpetrated as a pattern of behavior with the aim of exercising power and control over the person being abused, or others close to them, such as children. Family violence is hard to detect due to its insidious nature. It is very often perpetrated behind closed doors and through a combination of subtle and overt behavior in a pattern designed to control and slowly erode the confidence of another person. From a legal and philosophical perspective, it is the combination of all these dimensions that lie at the heart of the criminality of family violence.

A variety of terms are used in the law and literature to describe such violence, or subsets thereof. Some terms encompass a wide definition in terms of the relationships or settings within which such violence can occur, such as ‘family violence’ or ‘institutional abuse.’

¹ Victoria, Royal Commission into Family Violence, ‘Issues Paper’ (2015) <<http://www.rcfv.com.au/General-Documents>> 4.

² Law Commission, ‘Reform of Offences against the Person A Scoping Consultation Paper’ (Consultation Paper No 217, 2014) 126 [5.148].

³ For example, people who are living in the same house or residential facility or where there is a carer relationship.

Other terms describe violence between particular relationships, such as ‘domestic violence’ or ‘intimate partner violence,’ both of which have been used to refer to violence committed against a current or former intimate partner. Other terminology is also used to identify violence committed *by* particular members of the community, for example ‘adolescent family violence,’ or violence committed *against* particular members of the community, for example ‘elder abuse’ or ‘child sexual abuse.’ More recently, terms have been developed to describe the means or technology with which violence within intimate settings or relationships can be perpetrated, such as ‘technology facilitated abuse’ and ‘image-based abuse.’ These definitions are by no means settled.

Until relatively recently in legal history, the prevailing view worldwide was that violence ‘in the private sphere’⁴ between domestic partners or people in other family relationships was not a matter of public concern, nor one for state intervention. This is no longer the case. Change was spearheaded by more than 40 years of advocacy, largely by independent women’s organizations and feminist activists, and made by consequent law reform, particularly in jurisdictions such as the United Kingdom and United States, followed by Australia and other countries. Family violence is now well and truly at the forefront of Australian government policy and community consciousness. Family violence is generally understood to be both a prevalent and serious issue that can occur in all socio-economic groups in society⁵ and causes wide-spread and long-lasting harm.⁶

As society has evolved to recognize family violence, so has policy and law reform, concomitant with evidence of the nature and prevalence of family violence and its wide-

⁴ Heather Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review* 439, 441.

⁵ Victoria, Royal Commission into Family Violence, ‘Report and Recommendations’ (2016) <<http://www.rcfv.com.au/Report-Recommendations>> 57.

⁶ *Ibid* 32–39.

ranging effects on individuals, families, and society more broadly. Policy aimed at preventing violence within family relationships is reflected in civil laws,⁷ which aim to protect people at risk of experiencing, or who have experienced, family violence. Criminal justice policy development has largely focused on strengthening criminal laws, which aim to prosecute and sentence alleged perpetrators of family violence.⁸ Criminal justice reform (and associated research) has tended to focus on the ‘front end’⁹ of the system, particularly in Australian settings,¹⁰ with less attention being paid to the ‘back end’¹¹ of the system.¹² In the last decade in particular, efforts to tackle family violence have taken centre stage in Australian¹³ and international jurisdictions¹⁴ across a range of sectors, including policing and law, health services, and education.

⁷ For an overview, see Australia’s National Research Organisation for Women’s Safety (ANROWS), ‘Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper’ (State of Knowledge Paper Issue 16, Australia’s National Research Organisation for Women’s Safety (ANROWS), December 2015) <<http://anrows.org.au/publications/landscapes/domestic-and-family-violence-protection-orders-in-australia-investigation>>.

⁸ See for example, Tasmania’s Safe at Home policy and plans: Tasmanian Government, ‘Safe Homes, Safe Families: Tasmania’s Family Violence Action Plan 2015-2020’ (Safe Homes, Safe Families: Tasmania’s Family Violence Action Plan 2015-2020, Tasmanian Government, June 2015)

<<http://www.dpac.tas.gov.au/safehomessafefamilies>>; Department of Justice and Industrial Relations (Tas), ‘Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania’ (Options Paper, Tasmanian Government, August 2003)

<https://www.safeathome.tas.gov.au/__data/assets/pdf_file/0006/28374/Options_Paper.pdf>s.

⁹ For example, construction and operation of criminal offenses with respect to the nature and diversity of family violence, policing and prosecution practices in response to reports of family violence and issues in criminal procedure, such as bail and evidence laws.

¹⁰ See for example, Douglas’ extensive work in Australian settings, including Heather Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (2015) 39 *Melbourne University Law Review* 434.

¹¹ For example, sentencing law and practice, parole, post-sentence supervision and detention.

¹² Christine E W Bond and Samantha Jeffries, ‘Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases’ (2014) 54 *British Journal of Criminology* 849.

¹³ See for example, TNS, ‘Reducing Violence Against Women and their Children: Research Informing the Development of a National Campaign’ (Australian Government, Department of Social Services, 2015)

<<https://www.dss.gov.au/women/publications-articles/reducing-violence-against-women-and-their-children>>; Commonwealth of Australia, Department of Social Services, ‘National Plan to Reduce Violence Against Women and Children 2010-2022’ (Commonwealth of Australia, 2011)

<https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan_accessible.pdf>; Commonwealth of Australia, Department of Social Services, ‘Third Action Plan 2016-2019 of the National Plan to Reduce Violence Against Women and their Children 2010-2022’ (Commonwealth of Australia, 2016)

<<https://www.dss.gov.au/women/programs-services/reducing-violence/third-action-plan>>; Commonwealth of Australia, Department of Prime Minister and Cabinet, ‘COAG Advisory Panel on Reducing Violence Against Women and Their Children’ (Final Report, Commonwealth of Australia, 2016)

<<https://www.dpmc.gov.au/office-women/womens-safety/coag-advisory-panel-reducing-violence-against-women-and-their-children>>; Commonwealth, Department of the Prime Minister and Cabinet, *COAG 2016 National Summit* (2016) <<https://coagvawsummit.pmc.gov.au/>>; Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth, ‘Change the Story: A Shared Framework for the

Family violence as an evolving concept

Feminist advocacy and activism in the 1960s and 1970s broke historic ground in shining a light on violence ‘in the private sphere.’¹⁵ This work unearthed the extent of violence in domestic settings, with the feminist lens directly shaping the concept of ‘domestic’ violence, predominantly viewed, as it was then, as male violence against female intimate partners and their children. This has resulted in a large body of research demonstrating the gendered nature of family violence framed within the structure of heterosexual relationships as the norm. Consequently, there is a strong heteronormative narrative around gender in political, policy, and advocacy settings. Heteronormativity is a term used to describe the “pervasive nature of heterosexism ... leading to the uncritical adoption of heterosexuality as established norm or standard.”¹⁶ In the specific context of family violence, the influence of heteronormativity has been described as follows: “same-sex relationships are rendered deviant and invisible by the same patriarchal system that legitimizes male violence, as a bid for control, against women.”¹⁷

Leaving heteronormativity to the side for one moment, the significance of gender in the nature and dynamics of family violence is supported by existing data on the prevalence of family violence. Such data suggest that Australian women and children are at greatest risk of

Primary Prevention of Violence Against Women and Their Children in Australia’ (Our Watch, 2015) <<http://www.ourwatch.org.au/What-We-Do/National-Primary-Prevention-Framework>>; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response: Final Report* (Commonwealth of Australia, 2010).

¹⁴ Trust Law Connect, CMS and DLA Piper, ‘A Landscape Analysis of Domestic Violence Laws’ (Thomson Reuters Foundation, 2013); David L Richards and Jillienne Haglund, *Violence Against Women and the Law*, International Studies Intensives (Paradigm Publishers, 2015); Antonia Cretney and Gwynn Davis, *Punishing Violence* (Routledge, 1995); Joanne Belknap and Deanne Grant, ‘Fifty Years After the 1967 Crime Commission Report: How Nonpolicing Domestic Violence Research and Polices Have Changed and Expanded’ (2018) 17 *Criminology & Public Policy* 1.

¹⁵ Douglas, above n 10, 441.

¹⁶ Samantha Hardy, Olivia Rundle and Damien Riggs, *Sex, Gender, Sexuality and the Law* (Lawbook Co, Thomson Reuters, 2016) 27–28.

¹⁷ Claire Cannon and Frederick Buttell, ‘Illusion of Inclusion: The Failure of the Gender Paradigm to Account for Intimate Partner Violence in LGBT Relationships’ (2015) 6(1) *Partner Abuse* 65.

physical and sexual violence in the home at the hands of males they know.¹⁸ Data also suggest that in Australia, women and children are more likely to be victims of violence within intimate or other familial relationships, compared with men. Furthermore, intimate partner violence is the most common form of family violence, followed by violence perpetrated against children by parents.¹⁹ However, our understanding of how abuse can manifest in other family and domestic settings and relationships is still emerging, and does not necessarily reflect normative theories and explanations that apply to earlier notions of family violence. Our concept of family violence has evolved over the past 40 years from a phenomenon that occurs in adult intimate heterosexual relationships, to one that can occur in a range of intimate and family relationships or domestic settings, including those involving LGBTI people. There is increasing recognition of the nature of abusive behaviors within non-couple family relationships, for example, adolescent family violence,²⁰ elder abuse²¹ and institutional abuse of people under the care of government or other organizations.²² There is increasing recognition of these as prevalent, but underreported, forms of family violence. Violence can also occur within other family relationships, for example sexual abuse by one sibling against another, or by a grandparent, parent, or other older family member against children in a family. Technological change challenges previous notions about the nature of abusive behavior, by introducing new settings for the perpetration of violence.²³

¹⁸ Australian Bureau of Statistics, *Personal Safety Survey*, cat. no. 4906.0 (2012); Willow Bryant and Tracy Cussen, 'Homicide in Australia: 2010–11 to 2011–12 National Homicide Monitoring Report' (Monitoring Report no. 23, Australian Institute of Criminology, 2015) 1, 7.

¹⁹ Victoria, above n 5, 49, citing Australian Bureau of Statistics, above n 18.

²⁰ See for example, Positive Interventions for Perpetrators of Adolescent Violence in the home (PIPA), which is a project being led by the Centre for Innovative Justice, RMIT University: <https://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/current-research/pipa_project>.

²¹ See for example, Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Final Report (Australian Government, 2017).

²² See for example, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Commonwealth of Australia, 2017).

²³ See for example, Nicola Henry, Anastasia Powell and Asher Flynn, 'Not Just "Revenge Pornography": Australians' Experiences of Image-Based Abuse' (A Summary Report, RMIT University, May 2017) <http://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf>.

Of particular relevance to this research is the increasing awareness and acceptance of diversity in culture, gender and sexuality. This has fostered a more diverse understanding of what it means to be in a ‘relationship’²⁴ and ‘family,’²⁵ and reveals the complex dynamics of violence in the home. One such area of diversity is non-heterosexual and non-heteronormative intimate partner relationships and parented families, within which lesbian intimate relationships and lesbian parented families are situated. However, while non-heteronormative relationships are increasingly recognized as a potential site for family violence, when such violence occurs, the dominant heterosexist understanding of gender is not adequate to explain the particular roles that gender, and gendered power, may play in its commission, and in victims’ experiences of, and barriers to reporting, such violence.

LGBTI people, lesbian relationships and lesbian-parented families

Non-heterosexual and non-heteronormative people, groups, communities, or relationships tend to be discussed in literature and policy using the term ‘lesbian, gay, bisexual, transgender and intersex’ (LGBTI) or (LGBTIQ).²⁶ As recognized by the Victorian Royal Commission into Family Violence, transgender people and intersex people (referring to gender and sex diversity) have tended to be aligned in research with gay, lesbian, and bisexual people (referring to sexual orientation). Such alignment in the literature has traditionally occurred because their experiences of discrimination are shared or similar.²⁷

However, as the Victorian Royal Commission makes clear:

²⁴ For a detailed discussion of the social and legal recognition of diverse relationships, see Hardy, Rundle and Riggs, above n 16, 247–333.

²⁵ For a detailed discussion of formation and recognition of minority families, see *ibid* 338–68.

²⁶ Another term which incorporates people who identify as ‘queer’ is ‘lesbian, gay, transgender, intersex and queer’ (LGBTIQ). Queer is “an inclusive term which may use to collectively refer to bisexual, lesbian, gay and transgender communities, and others who may not identify with any of these categories but use it to describe a sexual orientation and/or gender identity or gender expression that does not conform to heteronormative society”: Michigan Coalition to End Domestic & Sexual Violence (MCEDSV), *LGBTIQ Definitions* Michigan Coalition to End Domestic & Sexual Violence (MCEDSV) <<http://www.mcedsv.org/resources/lgbtiq/2-uncategorised/98-lgbtiq-definitions.html>>.

²⁷ Victoria, above n 5.

Sexuality, gender identity and (non-binary) physical sex characteristics are, however, fundamentally different, and people living in these communities should be not treated as though they form a homogenous group who all have the same experiences.²⁸

At the same time, while it is important not to homogenize across LGBTI people, the diversities within these groups are not necessarily neatly bounded. There is great diversity within and across non-heteronormative groups defined as lesbian, gay, bisexual, transgender, and intersex. There may be points of overlap and blurring of the boundaries between these groups, such that one person may not necessarily fall neatly into one group or community. For example, within LGBTI communities, a bisexual woman in a lesbian relationship may identify as bisexual and as a lesbian, and this identity may be fluid. Some people cross both LGBTI and heterosexual communities; for example, a transgender man in a heterosexual relationship may identify and share experiences within both groups.

While there is much diversity, the term lesbian generally refers to a woman who is sexually attracted to other women.²⁹ This may include people in such relationships who are biologically female, or people who identify as female, including transgender or intersex people. There is less research, particularly in the Australian context, that focuses solely on experiences of violence by lesbian women within intimate relationships or families, or children within lesbian-parented families. Due to this, it has been necessary to also draw from literature that reflect the experiences of a broader group of LGBTI people and are not solely referable to lesbians as a specific group.

²⁸ Ibid 11.

²⁹ “A woman or girl whose primary sexual and romantic feelings are for people of the same sex”: Michigan Coalition to End Domestic & Sexual Violence (MCEDSV), above n 26.

Family violence in lesbian relationships and lesbian-parented families

Overall, while academic research on family violence has tended to be dominated by the traditional narrative of violence occurring within heterosexual relationships, some research on violence within LGBTI relationships does exist. There is a small but growing body of Australian research, predominantly coming out of New South Wales and Victoria, as well as international research on the prevalence and nature of family violence in LGBTIQ relationships generally. This emerging research has led to claims that “domestic violence [in gay and lesbian relationships] occurs at a rate comparable to that of men’s intimate violence’ in heterosexual intimate relationships.”³⁰ New South Wales health promotion organization, ACON,³¹ reports that one in three lesbian, gay, bisexual, transsexual, and intersex (LGBTI) people experience family violence, including violence from a “partner, ex-partner or family member ... meaning that LGBTI people are just as likely as people in the general population to experience [family violence].”³²

There is some Australian research that demonstrates the experiences of family violence by lesbian women. In 2014, the LGBTIQ Domestic and Family Violence Interagency and the University of New South Wales published a study on the experiences of domestic and family violence in LGBTIQ relationships. Data comprised 813 respondents to a survey, of which 34.1 per cent identified as lesbian and 10.8 percent as bisexual.³³ A key conclusion of the report was that “domestic and family violence is a very real and significant experience for

³⁰ LGBTIQ Domestic and Family Violence Interagency and Centre for Social Research in Health, University of NSW, ‘Calling It What it Really Is: A Report into Lesbian, Gay, Bisexual, Transgender, Gender Diverse, Intersex and Queer Experiences of Domestic and Family Violence’ (University of New South Wales, 2014) <<https://www.glhv.org.au/report/calling-it-what-it-really-report-lgbtq-experience-domestic-and-family-violence>>; Victoria, above n 5, 4.

³¹ ACON, *About ACON: Who We Are* (2018) ACON: Here for Health <<https://www.acon.org.au/about-acon/who-we-are/>>.

³² ACON, *What We’re Here For: Domestic & Family Violence* (2018) ACON: Here For Health <<https://www.acon.org.au/what-we-are-here-for/domestic-family-violence/#domestic-family-violence>>.

³³ LGBTIQ Domestic and Family Violence Interagency and Centre for Social Research in Health, above n 32.

many LGBTIQ people and that the impacts are wide and varied.”³⁴ Overall, 54.7 per cent of all people surveyed reported being in or having been in at least one relationship that was emotionally abusive, and 34.8 per cent reported being sexually or physically abused by an intimate partner. For those participants who had children, two-thirds (62.5 per cent) had the children living with them at the time of the abuse.³⁵ The reported experiences of participants who identified as lesbian are summarized below:

- Physical abuse on one or more occasion – 21.6 per cent.³⁶
- Sexual abuse on one or more occasion – “pressured to engage in sexual behaviour not comfortable with” (3.5 per cent) and rape (2.6 per cent).³⁷
- Emotional and verbal abuse on one or more occasion – emotional (20.6 per cent) and verbal (35.6 per cent).³⁸
- Social and financial abuse³⁹ on one or more occasion – social (16.5 per cent) and financial (8.0 per cent).⁴⁰
- Stalking on one or more occasion – 9 per cent.⁴¹
- Using “sexuality as a means of control” – 6.6 per cent.⁴²

Of the 28 lesbians who had children, 12 reported that their children were living with them at the time of the abuse, but did not witness it, and five reported that their children did witness the abuse.⁴³

³⁴ Ibid 3.

³⁵ Ibid.

³⁶ Ibid 14.

³⁷ Ibid 15–6.

³⁸ Ibid 17–8.

³⁹ This is described within the report as “controlling their partner’s social life and finances.” Examples of social abuse are stopping their partner from seeing friends or family, monitoring phone calls or text messages, or preventing them from leaving the house. Examples of financial abuse are controlling their money, putting them into debt, or causing them to be financially vulnerable: ibid 18–19.

⁴⁰ Ibid 19.

⁴¹ Ibid 20.

⁴² Ibid 21.

⁴³ Ibid 23.

The Royal Commission into Family Violence, which presented its report and recommendations to the Victorian Government in 2016, noted that while there is a dearth of research, the existing research “suggests that intimate partner violence may be as prevalent in LGBTI communities as it is in the general population.”⁴⁴ In a 2008 survey of 390 lesbian, gay, bisexual and transgender Victorians, just under a third of participants reported having been in a same-sex relationship where they experienced abuse, with 35 per cent of women and 29 per cent of men reporting partner violence or abuse. For women who identified as lesbian, this figure jumped to 42 per cent.⁴⁵ Emotional abuse was the most common form of abuse reported (77.0 per cent), followed by psychological abuse (58.3 per cent). Over half of the people reporting abuse said they were physically attacked or hit. Other forms of violence reported were isolation from family and friends (38.3 per cent) and deprivation of financial independence (23.3 per cent). While less common than some other forms of violence, 25.8 per cent reported experiencing sexual abuse within a same-sex relationship.⁴⁶ Other national and international studies suggest that this occurs at a similar rate in LGBTI relationships as in heterosexual intimate partner sexual violence.⁴⁷

West’s summation of the U.S. literature specific to lesbian relationships indicates that most studies report rates of physical violence of between 30 to 40 per cent in lesbian relationships, with estimates ranging from extremes of 8.3 to 73 per cent (most commonly “pushing,

⁴⁴ Victoria, above n 5, 35.

⁴⁵ William Leonard et al, ‘Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria’ (Gay and Lesbian Health Victoria (GLHV), Victoria Law Foundation, 2008) <<https://www.glhv.org.au/report/coming-forward-underreporting-heterosexist-violence-and-same-sex-partner-abuse-victoria>> 45.

⁴⁶ Ibid.

⁴⁷ Bianca Fileborn, ‘Sexual Violence and Gay, Lesbian, Bisexual, Trans, Intersex, and Queer Communities’ (ACSSA Resource Sheet, Australian Institute of Family Studies, Australian Government, 2012) <<https://aifs.gov.au/publications/sexual-violence-and-gay-lesbian-bisexual-trans-intersex-and-queer-communiti>>, 5; Lori B Girshick, ‘No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence’ (2002) 8 *Violence Against Women* 1500; Leonard et al, above n 47; LGBTIQ Domestic and Family Violence Interagency and Centre for Social Research in Health, above n 32, 4; National Coalition of Anti-Violence Programs (NCAVP), ‘Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015’ (New York City Anti-Violence Project, 2016) <https://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf>.

shoving and slapping”). Estimates of sexual violence in lesbian relationships range from 7 to 55 per cent and ranged from forced kissing to penetration. The highest rates of reported abuse were found when psychological and verbal abuse was included, with rates of over 80 per cent, commonly involving threats and verbal abuse.⁴⁸

The form of violence where least is known about in LGBTI relationships, and within lesbian relationships specifically, is sexual violence. Fileborn identifies that, compared to other forms of violence against LGBTI⁴⁹ people or sexual violence against women by men, violence that occurs within same-sex relationships is not well theorized.⁵⁰ However, the available evidence suggests that there are differences in the way that lesbians experience intimate partner violence, compared to gay men, with lesbian women more likely to be abused in private spaces and within intimate relationships.⁵¹ Girshick’s work on sexual violence in lesbian relationships reveals that, similar to heterosexual women’s experiences of sexual violence, lesbian and bisexual women’s experience of violence from female perpetrators comprises a continuum of behaviors. It can range from harassment and coercing behaviors to sexual assault and rape.⁵²

Limits of the existing data on family violence in lesbian relationships, and in LGBTI people’s relationships generally

While it has been suggested that family violence is experienced at similar levels within non-heteronormative relationships as within heteronormative relationships, such comparisons may

⁴⁸ Carolyn M West, ‘Lesbian Intimate Partner Violence’ (2002) 6(1) *Journal of Lesbian Studies* 121, 123; referring to the following reviews: L K Burke and D R Follingstad, ‘Violence in Lesbian and Gay Relationships: Theory, Prevalence, and Correlational Factors’ (1999) 19 *Clinical Psychology Review* 487; L K Waldner-Haugrud, ‘Sexual Coercion in Lesbian and Gay Relationships: A Review and Critique’ (1999) 4 *Aggression and Violent Behavior* 139.

⁴⁹ Fileborn uses the term GLBTIQ (gay, lesbian, transgender/transsexual, bisexual, intersex, and queer).

⁵⁰ Fileborn, above n 49.

⁵¹ Gail Mason, ‘Violence Against Lesbians and Gay Men’ (AIC Violence Prevention Today, No. 2, Australian Institute of Criminology, 1993).

⁵² Girshick, above n 49.

be problematic and care must be taken in relying on existing data to support such an assertion due to its current limitations. Limitations in the data documenting the prevalence of violence in relationships experienced by LGBTI people can be linked to underreporting and methodological issues.

Underreporting

It is well recognized that there has been, and continues to be, underreporting of violence in LGBTI people's relationships, which has contributed to a lack of awareness of the prevalence and nature of such violence. For example, in a study of 390 gay, lesbian, bisexual, transsexual and transgender Victorians by Leonard et al., two-thirds of participants did not report the abuse they received from a same-sex partner. Reasons for not reporting included fears that the abuse would escalate, the abuse was minor, they would not be fairly dealt with, they did not know where to get help, they had fear of further violence or discrimination or being outed, and they feared losing the relationship. The authors suggest that heterosexism also may play a role in the decision not to report such abuse, although not to the same extent as it does in the underreporting of heterosexual abuse.⁵³ Others have argued that it is heterosexism, combined with homophobia, that forms a unique barrier to identifying and reporting relationship violence experienced by LGBTI people, and which, when exploited by perpetrators, also forms part of the nature of such violence.⁵⁴

Another issue relevant to underreporting is disparity in access to services. LGBTI people are less likely to find the support services that they need to meet their specific needs. Some of the factors that can operate as barriers to seeking help are:

⁵³ Leonard et al, above n 47, 47–48.

⁵⁴ J L Ristock, *No More Secrets: Violence in Lesbian Relationships* (Routledge, 2002); L Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3(4) *Murdoch University Electronic Journal of Law* <<http://www5.austlii.edu.au/au/journals/MurUEJL/>>.

- Mainstream services do not address the needs of LGBTI people: for example, safe housing services for male victims; lack of supports and interventions for female perpetrators; and services that are inclusive of transgender and intersex people.
- Victims of family violence in LGBTI relationships fear that police and service providers will fail to understand, minimize, or take seriously their experience of violence or discriminate against them on the basis of their status.
- Victims of family violence in LGBTI relationships have concerns about their legal rights over children and assets were they to report family violence.⁵⁵

In addition to these multiple barriers, a further key reporting barrier is fear of, or actual experiences, of heterosexist or homophobic responses of criminal processing systems for LGBTI people, particularly in policing.⁵⁶ A range of other barriers to reporting family violence in LGTBI communities have been identified in the literature.⁵⁷

Methodological issues

Methodological issues also contribute to the lack of reliable data around family violence in lesbian relationships and lesbian parented families, and more generally in relationships involving LGBTI people. For example, large-scale surveys measuring sexual violence and police crime data tend not to take into consideration sexuality or gender identity, “other than

⁵⁵ ACON, above n 34.

⁵⁶ Leonard et al, above n 47; Girshick, above n 49, 1507. See also, Angela Dwyer et al, *Exploring LGBTI Police Liason Services: Factors Influencing Their Use and Effectiveness According to LGBTI People and LGBTI Police Liaison Officers*, Report to the Criminology Research Advisory Council Grant: CRG 31/11-12 (Criminology Research Grants, 2017).

⁵⁷ See Fileborn, above n 49, 8–9; Jenna M Calton, Lauren Bennett Cattaneo and Kris T Gebhard, ‘Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence’ (2016) 17 *Trauma, Violence and Abuse* 585 **Error! Bookmark not defined.**; Leonard et al, above n 47; Kate O’Halloran, ‘Family Violence in an LGBTIQ Context’ (2015) 2 *DVRCV Advocate* 10; Susan C Turell and Molly M Hermann, “‘Family’ Support for Family Violence: Exploring Community Support Systems for Lesbian and Bisexual Women Who Have Experienced Abuse” 12 *Journal of Lesbian Studies* 211; Ruth McNair et al, ‘LGBTQ Homelessness: Risks, Resilience, and Access to Services in Victoria’ (GALFA LGBTQ Homelessness Research Project Final Report, The University of Melbourne, Swinburne University of Technology, 2017) <<http://www.lgbtihomeless.com/>>; Susan C Turell and La Vonne Cornell-Swanson, ‘Not All Alike: Within-Group Differences in Seeking Help for Same-Sex Relationship Abuses’ (2005) 18 *Journal of Gay & Lesbian Studies* 71.

according to the male/female binary, where the sex and gender identity are often conflated.”⁵⁸

Previous research has also tended to involve small non-random samples of self-selected participants, resulting in an over-representation of white, middle-class, and educated participants and an under-representation of lesbian people from diverse backgrounds.

Methodological issues in research involving violence in lesbian relationships include different timeframes for research and inconsistent instruments to measure violence.⁵⁹ The existence of these methodological issues therefore makes it difficult to compare the existing data on violence in non-heteronormative relationships and communities with the data on violence within heteronormative relationships and communities, something well documented by existing data.

Invisibility of lesbian relationships and lesbian parented families and the ‘myth of lesbian utopia’

Limitations aside, the available research does demonstrate that violence, particularly intimate partner violence, is a significant issue in LGBTI people’s relationships. As Calton, Cattaneo, and Gebhard note: “[a]n emerging literature [endeavours] to describe all IPV survivors’ experiences, but much work needs to be done before research and practice are truly inclusive of all survivors.”⁶⁰ The failure to acknowledge and address family violence experienced by LGBTI people from a law and policy response has prompted claims of “an invisibility of LGBTI relationships in policy and practice responses and a lack of acknowledgement that intimate partner violence exists in these communities.”⁶¹

⁵⁸ Fileborn, above n 49, 4, 6.

⁵⁹ West, above n 50, 122.

⁶⁰ Calton, Cattaneo and Gebhard, above n 59, 585.

⁶¹ Monica Campo and Sarah Tayton, ‘Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues’ (Practitioner Resource, Australian Institute of Family Studies, Australian Government, 2015) <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtq-communities>> 1.

Focusing specifically on lesbian identity, its absence in academic, policy, and legal conceptualizations of family violence has its roots in the feminist advocacy and research that historically progressed the recognition of domestic violence. Writing in 1988, Renzetti identifies that research on domestic violence “mushroomed during the past two decades ...[but] still surprisingly little attention has been given to the problem of partner abuse among homosexual couples.”⁶² As Girshick writes:

During the early second wave of feminism, theories on violence against women were based on the premise that men used violence to maintain power, control, and privilege.

Consequently, if power and control are linked to males, the assumption was that two women together should mean the absence of abuse.⁶³

The “myth of lesbian utopia”⁶⁴ was connected to the denial of the possibility of violence occurring within lesbian relationships. It is well-recognized that a key phenomenon underpinning the invisibility of violence within lesbian intimate relationships and lesbian parented families is fear of negative perceptions or judgment of lesbian relationships. Particularly in the context of the development of feminist legal theory on sexual violence, the possibility of violence occurring within same-sex female relationships was largely denied.⁶⁵ Another key factor that made researchers reluctant to draw attention to negative issues in lesbian relationships was fear of negative stereotypes and homophobic policy reactions,

⁶² Claire M Renzetti, ‘Violence in Lesbian Relationships: A Preliminary Analysis of Causal Factors’ (1988) 3 *Journal of Interpersonal Violence* 381, 381.

⁶³ Girshick, above n 49, 1053.

⁶⁴ Ibid.

⁶⁵ Fileborn, above n 49, 7; Girshick, above n 49, 1503; Justine Hotten, ‘The Utopian Nightmare: Key Issues about Lesbian Domestic Violence according to Brisbane Domestic Violence Services’ (Paper presented at the ANZCCC: The Australian and New Zealand Critical Criminology Conference, Sydney 2010) (Institute of Criminology, Sydney Law School, The University of Sydney, 2011) <<https://ses.library.usyd.edu.au/handle/2123/7371>> 1.

especially after many years of fighting for recognition and parenting rights for gay and lesbian communities.⁶⁶

In light of this history, the question remains whether lesbian identity continues to be invisible in academic, policy, and legal conceptualizations of family violence. The emergent evidence on the prevalence of violence in lesbian relationships and lesbian-parented families may have dispelled the myth of the lesbian utopia in the academic context. However, the extent to which this has translated into greater visibility of lesbian identity, including lesbian intimate partner relationships and lesbian-parented families, in legal and policy conceptualizations of family violence remains relatively unexplored in the Australian context.

Focusing on the notion of legal invisibility, I examine the extent to which family violence laws in two Australian jurisdictions – Victoria and Tasmania – recognize and frame lesbian identity in intimate relationships and lesbian-parented families. Invisibility (or visibility) is viewed in light of the influence of heteronormativity, contrasted with the emerging conceptualization of family violence in lesbian relationships and lesbian-parented families, as evidenced by scholarly literature on the nature and dynamics of such violence.

Tasmania and Victoria differ on a variety of socio-economic and criminological measures. However, they present an interesting point of comparison from the perspective of legal and policy approaches to family violence.⁶⁷ Both Tasmania⁶⁸ and Victoria⁶⁹ have been

⁶⁶ Jennifer L Hardesty et al, 'Lesbian Mothering in the Context of Intimate Partner Violence' (2008) 12 *Journal of Lesbian Studies* 191, 192. See also, J Stacey and T Biblarz, '(How) Does the Sexual Orientation of Parents Matter?' (2001) 66 *American Sociological Review* 159; Renzetti, above n 64; West, above n 50.

⁶⁷ These jurisdictions are the subject of the author's broader PhD research on the potential for therapeutic jurisprudence approaches to be harnessed by judicial officers in court-craft for delivering and communicating sentences as part of legal and policy responses to family violence, within which the research for this article was conducted.

⁶⁸ Tasmania's policy approach to tackling family violence is founded on the concept of a multi-agency and integrated criminal justice response favouring arrest and prosecution in response to family violence. 'Safe at

instrumental in criminal justice reforms to tackle family violence, but, as discussed below, their respective legislative regimes include vastly different definitions of family violence in terms of the relationships included in the concept of ‘family.’ This article represents the first analysis of how these two jurisdictions (within the broader Australian context) recognize and reflect lesbian identity in family violence legislation.

Australian family violence laws

Legal responses to family violence have been developed under criminal law and civil law, comprising civil protection order regimes and some aspects of family and child protection laws. The form and operation of civil and criminal family violence laws vary greatly across Australian states and territories, but some commonalities do exist.

Civil laws

All Australian states and territories have specialized civil family violence protection order regimes designed to protect those who have experienced violence, or are at risk of experiencing violence, through the issuing of police or court family violence protection orders.⁷⁰ Other civil legal frameworks play an overlapping role in the response to family violence. These include child protection legislation aimed at protecting children from abuse, violence and neglect, guardianship laws aimed at protecting the health of elderly people (as well as adults with disabilities, and young people) and other legislation aimed at safeguarding

Home’ has been in place since 2004, and continues to be built on with ‘Safe Homes, Safe Families’: see Department of Justice and Industrial Relations (Tas), above n 8; Tasmanian Government, above n 8.

⁶⁹ Victoria held the first Royal Commission into family violence in Australia, and is in the midst of significant reform to implement the recommendations the Royal Commission delivered in 2015: see Victoria, above n 5.

⁷⁰ See Australia’s National Research Organisation for Women’s Safety (ANROWS), above n 7.

against elder abuse by family members, and family law, where family breakdown is often accompanied or precipitated by family violence.⁷¹

Criminal laws

Behavior that is prohibited under civil family violence orders is criminalized through the creation of contravention offenses, punishable by imprisonment or a fine, or both.⁷² This could include criminal behavior, such as a physical assault, or behavior that otherwise would not be criminal but for the order being in place, such as contacting the person who is protected under the order. Further, criminal laws in each state and territory are applied as a response to family violence, and some jurisdictions have developed specialized criminal justice policies and strategies as a framework for the criminal response to family violence.⁷³

Generally, under the criminal law, behavior that constitutes family violence may be the subject of criminal charges under existing ‘traditional’ criminal offenses.⁷⁴ However, these existing criminal offenses do not necessarily cover the range and nature of behavior that is now understood to be family violence. Further, the majority are incident-focused in nature and therefore do not reflect or capture “the continuing nature and patterns of domestic violence and the power and control inherent in such behavior.”⁷⁵ No Australian jurisdiction has a ‘blanket’ or stand-alone domestic violence offense,⁷⁶ nor an offense that focuses on

⁷¹ See Rae Kaspiew et al, ‘Evaluation of the 2012 Family Violence Amendments: Synthesis Report’ (Australian Government, Australian Institute of Family Studies, October 2015) <<https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments>>.

⁷² Australia’s National Research Organisation for Women’s Safety (ANROWS), above n 7.

⁷³ See for example, Tasmania’s Safe at Home policy and plans: Tasmanian Government, above n 8.

⁷⁴ These could range from the most serious charges, such as murder, manslaughter and rape, to other physical and sexual assaults and property offenses, as well as threatening behavior, such as stalking and making threats to kill.

⁷⁵ Douglas, above n 10, 437. See also, Australian Law Reform Commission and New South Wales Law Reform Commission, above n 13.

⁷⁶ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family in Queensland* (Queensland Government, 2015), 259.

controlling or coercive behavior.⁷⁷ Some Australian jurisdictions have introduced specialized criminal offenses that encompass some of the particular features of family violence not covered by traditional criminal offenses.⁷⁸ For example, Tasmania has introduced the offenses of economic and financial abuse, which sit within its family violence legislation.⁷⁹ Depending on the category of an offense⁸⁰ and its seriousness, it will be prosecuted in either the Magistrates' Court or a higher court.⁸¹ Following a successful prosecution of a criminal offense involving family violence, a judicial officer must decide the consequences for the offender in terms of conviction and sentence according to the applicable legislative and common law sentencing framework.

Recognition and framing of lesbian identity in Victorian and Tasmanian family violence order regimes

Within this broader context, the analysis below examines how lesbian identity is framed, if at all, in the civil protection order regimes and associated criminal offenses as legal responses to family violence in Victoria and Tasmania. In Victoria, the *Family Violence Protection Act 2008* (Vic) ('FVPA') aspires to set out 'an effective and accessible system'⁸² for family violence intervention orders and family violence safety notices, as well as creating an offense scheme for contraventions of intervention orders and safety notices. In Tasmania, the relevant legislative framework in response to family violence is the *Family Violence Act 2004* (Tas)

⁷⁷ Douglas, above n 10, 449.

⁷⁸ For an overview, see *ibid* 449–58.

⁷⁹ *Family Violence Act 2004* (Tas) ss 8–9. For a discussion of the operation of these provisions, see: Marilyn McMahon and Paul McGorrey, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience' (2016) 35 *The University of Tasmania Law Review* 1.

⁸⁰ Offenses are generally categorized as 'summary' (which can be heard by a magistrate without a jury), 'indictable triable summarily' (which, depending on their seriousness, can be heard by a magistrate without a jury or heard in a higher court before a judge and/or jury), or 'indictable' (serious crimes, which must be heard in a higher court before a judge and/or jury).

⁸¹ Higher courts include intermediate courts, such as the County Court in Victoria or the District Court in South Australian, and superior courts, such as the Supreme Court. Victoria has a County Court and a Supreme Court. Tasmania does not have a court of intermediate jurisdiction, and its only higher court is the Supreme Court of Tasmania.

⁸² *Family Violence Protection Act 2008* (Vic) s 2.

(‘FVA’). Similar to the Victorian FVPA, it creates a scheme for the imposition of civil protection orders enforceable through the creation of criminal offenses relating to the breach of such orders.

Legislatively defined features of family violence

Overall, Victoria’s FVPA encompasses a wide definition of family violence, both in the form of violence and the relationships identified to be ‘family’ relationships for the purposes of constituting family violence. However, the legislatively defined ‘features of family violence’ recognized by the Victorian Parliament provide a largely heteronormative gendered conceptualization of family violence. Family violence is construed as predominantly gendered violence “committed by men against women, children and other vulnerable persons.”⁸³

While this conceptualization of family violence is reflected in the data on prevalence, it preferences heterosexual relationships and heterosexual parented families as the usual family structures within which violence occurs. It may also lead to additional myths that victims/survivors must deal with in relation to the violence that they experience that are specific to the nature and dynamic of lesbian relationships. One such myth is the problematic assumption that the aggressor of the violence is the one more ‘masculine’ in appearance or demeanor, as this cannot be determined on the basis of gender. Another myth is that there is more likely to be mutual battering in lesbian relationships, where instead there tends to be violence being inflicted by a primary aggressor against a victim.⁸⁴ These heteronormative gender assumptions may also play out in how police respond to family violence incidents involving lesbian intimate partners or lesbian parented families, in determining who is the

⁸³ Ibid Preamble (a) (“features of family violence”).

⁸⁴ West, above n 50, 123–4.

primary aggressor for the purpose of imposing police family violence orders⁸⁵ or family safety notices⁸⁶ or gathering evidence to support criminal charges, such as contravention of family violence intervention orders.

The preferencing of heteronormative relationships and family structures may also in and of itself lead to vulnerability to family violence victimization. West's 2002 study on lesbian intimate partner violence discussed the incidence rates and forms of violence, dynamics, and correlates of abuse within lesbian intimate partner relationships and suggestions for intervention.⁸⁷ West concluded that while there may be some similarities in the dynamics of violence in lesbian relationships to those in heterosexual relationships, some key differences include an internalized sense of homophobia and that lesbians "may be at increased risk for verbal and physical abuse by family members when they reveal their sexual orientation."⁸⁸ This could increase the likelihood of being involved in a violent intimate relationship as an adult.⁸⁹

Despite the prominence of gender in the heteronormative framing of the features of family violence, the Victorian FVPA does expressly acknowledge that family violence crosses societal boundaries, both in terms of the "location, socio-economic and health status age, culture, gender, sexual identity, ability, ethnicity or religion"⁹⁰ of victims of family violence. The FVPA rightly construes family violence as rendering children particularly vulnerable when exposed to its effects, due to the "serious impact on children's current and future

⁸⁵ *Family Violence Act 2004* (Tas) pt 3. A police family violence order is an order that may be made by police; however, they are not temporary measures, like Victoria's safety notices, but can remain in place and operate without the matter having to be heard before a court to make orders for longer term protection.

⁸⁶ *Family Violence Protection Act 2008* (Vic) pt 3. A family violence safety notice is a notice that may be issued by police, which operates as a temporary protection measure against family violence, until the matter can be heard before a court for decision as to whether a (more permanent) intervention order should be made.

⁸⁷ West, above n 50.

⁸⁸ *Ibid* 124–5.

⁸⁹ *Ibid*.

⁹⁰ *Family Violence Protection Act 2008* (Vic) Preamble (c)–(d) ("features of family violence").

physical, psychological and emotional wellbeing.”⁹¹ Overall, the emphasis on the protection of women and children is such that it may be argued that they are “given higher priority by the FVPA than that of other affected family members.”⁹² However, there is no mention of diversity in the familial structures within which children may be exposed to the effects of family violence, including same-sex parented relationships, families of choice, and more fluid family structures that may be associated with LGBTI(Q) relationships. Specific to lesbian relationships, a ground-breaking U.S. study published in 1988 by Renzetti examined the experiences of 100 lesbians who had been in violent relationships and the extent to which children are affected by violence occurring within lesbian-parented families. Thirty-five women had lived with their own or their partner’s children and almost 30 per cent of these women reported that the abuser had also been violent towards the children, and 20 per cent reported that their own abuse had occurred in front of the children (their own or their partner’s). The pattern of abuse reported is consistent with that reported in heterosexual relationships, whereby the violence increases in severity and frequency over time, and where children are commonly exposed to the violent behavior.⁹³

Turning to Tasmania’s FVA, it has no such general statement about the features of family violence. For example, it does not reference any notion of gender or sexuality in the nature of family violence. Nor does it refer to the nature of family violence as extending beyond intimate partner relationships (consistent with Tasmania’s limited definition of ‘family relationship’ discussed below). Its silence in relation to the diversity of gender or sexuality similarly results in a heteronormative framing of family violence and fails to reflect the unique dynamics and vulnerabilities associated with family violence in non-heteronormative relationships.

⁹¹ Ibid Preamble (b) (“features of family violence”).

⁹² Greg Connellan et al, *Family Violence and Child Protection Law in Victoria* (Thomson Reuters, 2016) 67.

⁹³ Renzetti, above n 64.

However, unlike the Victorian legislation, Tasmanian legislation does not conceptualize family violence as a gendered phenomenon and uses the terms ‘he’ or ‘she’ in language to describe and define the relationships and behavior included in family violence. Language has been identified as a “fundamental component to researching [LGBTI] health disparities in relation to family violence.”⁹⁴ While feminist approaches should not be denounced, continued use of “gender-specific language [and] merely using a male-female binary in our language ostracizes many of those who identify outside of traditional gender norms.”⁹⁵ Removal of such limitations in the language used in family violence legislation will assist to disrupt the heteronormative assumption of heterosexuality and render the law more reflective of diversity in the sexuality and gender of people who are preparators and victims of family violence.

Relationships included in the definition of family violence

The Victorian FVPA’s definition of ‘family member’ creates a broad definition of family violence, in terms of the relationships that are included within ‘family,’ which includes lesbian intimate partner relationships and lesbian-parented families. Section 8 of the FVPA includes the following within a definition of family member:

- current or former spouse or ‘domestic partner’ of a person;
- a person who is or has been in an intimate relationship (whether or not sexual in nature) with the person;

⁹⁴ Samuel Chiron, ‘How Heteronormative Paradigms Ostracize Queer Populations in Intimate Partner Violence Research,’ *HuffPost: THE BLOG* (online), 9 February 2017 <https://www.huffingtonpost.com/samuel-chiron/how-heteronormative-parad_b_9171030.html>.

⁹⁵ Ibid.

- current or former ‘relative’⁹⁶ of the person;
 - a child who normally or regularly resides with the person, or has previously done so;
- or
- a child of someone who has or has an intimate relationship (whether or not sexual in nature) with the person.

Section 9 provides a broad definition of a ‘domestic partner.’ It includes situations where two people are in a registered relationship under the *Relationships Act 2008* (Vic) or two people are in a relationship as a couple that is not a marriage, but where one or each provides “personal or financial commitment and support of a domestic nature.”⁹⁷ Gender, and whether the two people are living in the same house, are expressly considered to be irrelevant for the purposes of determining whether two people are domestic partners. However, a relationship is not a domestic partnership if one person provides domestic support for fee or reward or on behalf of an organization and or merely because two people are co-tenants.⁹⁸

In addition to these relationships expressly defined to identify a person as a ‘family member’ for the purposes of family violence, the Victorian legislation also includes self-identified family relationships in the conceptualization of family violence. Section 8(3) of the FVPA provides that a family member of a person also includes any other person whom the relevant person “regards or regarded ... as being like a family member,” if it is or was reasonable to regard them as such, “having regard to the circumstances of the relationship” viewed in its entirety.⁹⁹ A range of factors is relevant to the determination of whether it is reasonable to regard two people as being in a relationship, which include less traditional markers of an

⁹⁶ The term ‘relative’ is defined very broadly under the Victorian FVPA, and includes a range of additional family members that are related by whole blood, half-blood, marriage, domestic partnership and adoption: *Family Violence Protection Act 2008* (Vic) s 10.

⁹⁷ *Ibid* s 9(1)(b).

⁹⁸ *Ibid* s 9.

⁹⁹ *Ibid* s 8(3)–(4).

intimate relationship, including the nature of social and emotional ties, whether they live or relate together in a home environment, and the provision of sustenance or support.¹⁰⁰

In contrast to Victoria, the definition of ‘relationship’ in family violence in Tasmanian law is narrow. It is narrow in the sense of being limited to intimate partners (rather than the broader notion of ‘family’), as well as the definition of relationship reflecting more traditional heteronormative assumptions of what constitutes a significant intimate relationship. Family violence in Tasmania is confined to behavior against a spouse or partner, defined in section 4 of the FVA as a person with whom another person is, or has been, in a ‘family relationship.’ A family relationship is, in turn, defined in the *Relationships Act 2003* (Tas) as a marriage or relationship between two adults as a couple that is ‘significant’ (determined by factors such as whether they live together, have children, and/or share finances).¹⁰¹

As identified by Hardy, Rundle, and Riggs, there can be challenges when determining the status of intimate lesbian couples (and other ‘minority couples’) compared to heterosexual couples in the context of de facto relationships (a couple living together on a genuine domestic basis). Many of the indicators that may apply to heterosexual couples may not apply, and “care must be taken not to make heterosexist assumptions.”¹⁰² Despite higher levels of societal acceptance of minority couples, legal recognition of de facto lesbian relationships and most recently changes to the law to allow marriage equality, Hardy, Rundle and Riggs’ assertion rings true that “there is still some stigma attached to same gender relationships, which affects the way people conduct their lives.”¹⁰³

¹⁰⁰ Ibid s 8(3).

¹⁰¹ *Family Relationships Act 2003* (Tas) s 4.

¹⁰² Hardy, Rundle and Riggs, above n 16, 277.

¹⁰³ Ibid.

The limited factors that apply to the assessment of a significant relationship in Tasmania (living together, having children, and/or sharing finances) may not be reliable or appropriate indicators of a significant lesbian relationship if individuals are conducting their lives in a particular way to avoid the stigma of openly being in a lesbian relationship. The stigma associated with openly being in a lesbian relationship may therefore make lesbian intimate partner relationships less 'visible' and therefore less likely to meet the required definition of a significant relationship within the meaning of the law.

Heteronormative assumptions associated with lesbian mothering can also lead to a closeting and a lack of visibility of lesbian parented families. Hardy, Rundle and Riggs describe the impact of heteronormativity on lesbian mothers as follows:

When lesbian women come out, their sexuality may remain salient for many people they encounter. When a lesbian woman has a child, however, given the heteronormative presumption that mothers are heterosexual, lesbian mothers may find themselves put back in the closet, not of their volition. Coming out then becomes an ongoing act through one's own volition, or because disclosure is necessary in order to access a particular service or to receive a particular form of support.¹⁰⁴

In some cases, disclosure may be avoided due to fear of consequences associated with the heteronormative paradigm. This is demonstrated by a 2008 study by Hardesty et al¹⁰⁵ examining lesbian mothering in context of physical intimate partner violence. Conducted in the United States, it provides insights into the nature of violence in lesbian relationships and lesbian-parented families. The study comprised interviews with 24 lesbian mothers who had

¹⁰⁴ Ibid 48–49.

¹⁰⁵ Hardesty et al, above n 68.

experienced physical abuse by a same-sex partner, and found three types of intimate partner violence: ‘intimate terrorism,’ ‘situational violence,’ and ‘mutual violent control.’¹⁰⁶

Hardesty notes that, consistent with previous literature, these dynamics of violence experienced by lesbian mothers are similar to those experienced by heterosexual mothers.

However, “lesbian mothers’ experiences are uniquely complicated by heterosexism and homophobia that impose chronic and acute stressors to be managed.”¹⁰⁷ While lesbian motherhood may have made gains in social acceptance, violence within lesbian relationships and lesbian-parented families is still largely hidden due to fear of stigma or losing custody of children.¹⁰⁸ Hardesty concludes that a key influencing factor on the decision to leave the abusive partner was the relationship between the abuser and the child, with mothers more likely to stay in the relationship and attempt to resolve the issues when the abuser was a legal co-parent and the violence was categorized as ‘situational.’¹⁰⁹

Behavior included in the definition of family violence

Both Victoria’s FVPA and Tasmania’s FVA create a broad definition of family violence, in terms of the behavior that constitutes ‘family violence.’ The definitions in both jurisdictions encompass acts or threats of harm to person (sexual and non-sexual physical assault) or property, economic abuse, emotional abuse.¹¹⁰

The available scholarly literature suggests that the same elements that exist in all abusive relationships exist in abusive relationships involving LGBTI people, in terms of the violence covering a wide range of behaviors designed to exercise power and control over others and

¹⁰⁶ Ibid 192.

¹⁰⁷ Ibid 193.

¹⁰⁸ Ibid. See further: C J Patterson, ‘Children of Lesbian and Gay Parents’ (1992) 63 *Child Development* 1025; Stacey and Biblarz, above n 64.

¹⁰⁹ Hardesty et al, above n 68, 207–8.

¹¹⁰ *Family Violence Protection Act 2008* (Vic) s 5(1); *Family Violence Act 2004* (Tas) s 7.

the patterns and cycles of violence. However, family violence in LGBTI communities also has some unique features that make the family violence experience of LGBTI people distinct from other forms of violence.¹¹¹ A person's intersex or transgender status, sexuality, gender (or expression of gender) or HIV status can be used against them or used as a basis to 'out' someone to family, friends, workplace or to other people in the person's community.¹¹² A related form of violence can be telling a partner that they will lose custody of their children as a result of being 'outed.'¹¹³ Another form of violence can be pressuring someone to conform to sex or gender norms or controlling medication or access to healthcare related to gender transition.¹¹⁴ In some cases, homophobia is used to control a person, for example telling them that they will not be able to get help or support from police or services because the system is homophobic. Other forms can include telling a partner that they are not a 'real' lesbian, gay or bisexual or that they deserve the abuse because of the fact that they are LGBTI.¹¹⁵

These features of violence unique to the nature and dynamics of family violence in LGBTI relationships are reflected to varying degrees from the Victorian and Tasmanian legislative frameworks. Tasmania's definition of family violence does not make any express reference to particular examples of behavior that encapsulate or reflect lesbian experiences or identity. However, some of the particular features of violence in LGBTI relationships may be captured, though not expressly so, in the family-violence specific offense of 'emotional abuse and intimidation.' Section 9 of the FVA defines emotional abuse or intimidation as a "course of conduct by a person that he or she knows (or ought to know) is likely to unreasonably control or intimidate, or cause mental harm, apprehension or fear in, his or her spouse or partner." A course of conduct is expressly defined to include threatening or intimidating

¹¹¹ Victoria, above n 5; Hotten, above n 68.

¹¹² ACON, above n 34; Victoria, above n 5; West, above n 50.

¹¹³ Victoria, above n 5.

¹¹⁴ ACON, above n 34.

¹¹⁵ Victoria, above n 5.

behavior that limits the ‘freedom of movement’ of a spouse or partner.¹¹⁶ Tasmania’s conceptualization of emotional abuse and intimidation as an offense includes a requirement that the prescribed behavior be committed with a particular intention by a would-be perpetrator: to unreasonably control or intimidate, or to cause “mental harm, apprehension or fear.”¹¹⁷ While Victoria’s regime does not include any specific family violence offenses, the definition of emotional or psychological abuse in the FVPA specifically includes a reference to lesbian identity by providing an example that is directly relevant to the experience of lesbian, gay and bisexual communities – “threatening to disclose a person’s sexual orientation to family or friends against the person’s wishes.”¹¹⁸

Concluding comments

This article has examined the legislative frameworks in response to family violence in Victoria and Tasmania, and the extent to which they reflect or frame lesbian identity and experiences of family violence in intimate and family relationships. The Victorian legislation does go some way to expressly including diversity in sexuality, and specific elements of the Tasmanian legislation implicitly reflect some of the unique features of family violence in lesbian relationship. However, overall, both jurisdictions are largely heteronormative in their conceptualization of family violence.

The limited but powerful evidence about the prevalence of family violence in relationships involving LGBTI people has, therefore, failed to disrupt the heteronormative narrative and to bring the issue of LGBTI family violence into public or policy consciousness through legislative means. The current narrative as expressed in legislation in the two featured Australian jurisdictions predominantly reflects heterosexual norms of intimate relationships

¹¹⁶ *Family Violence Act 2004* (Tas) s 9.

¹¹⁷ *Ibid* 8–9.

¹¹⁸ *Family Violence Protection Act 2008* (Vic) s 7 (“Meaning of emotional or psychological abuse”).

and family structures in society, which are also reflected in the broader national family violence policy framework.¹¹⁹

Experiences, and fear of, homophobia is a key theme that emerges from the literature, both as a unique feature of the nature and dynamics of lesbian family violence and as a key driver of its invisibility in family violence laws and scholarly literature. West attributes the overlooking and understudying of violence in lesbian relationships to “discrimination, most notably homophobia, the irrational fear and hatred of lesbians, and heterosexism, or the belief that heterosexuality is normative ... [resulting in] theories that conceptualize as involving male perpetrators and female victims, which contributes to the invisibility of lesbian battering.”¹²⁰ Further research in this area could include an analysis of lesbian identity in the conceptualization of family violence in other legislation in Australian and international jurisdictions, as well in the broader legal and policy context, including police and prosecution practices and case law. While it is important to examine the legal constructs and the extent to which they reflect the diversity of our emerging understanding of the diversity of family violence, the social context within which laws are applied must also be examined to ensure that non-heteronormative relationships can also be brought to the front of societal consciousness in addressing family violence. As Hardy, Rundle and Riggs remind us: “The law is not neutral, in the sense that specific laws are shaped by the worldviews of those who develop them, worldviews that enshrine a particular moral and ethical code.”¹²¹ Chiron also reminds us that the “dominance of heteronormativity in everyday society and ties to cultural values”¹²² means that it is difficult to disrupt. However, this makes it all the more important to do so, given that “current models may not adequately address the social, emotional,

¹¹⁹ See for example, Our Watch, above n 13.

¹²⁰ West, above n 50.

¹²¹ Hardy, Rundle and Riggs, above n 16, xxv.

¹²² Chiron, above n 97.

cultural or environmental effects that lead gender and sexual minorities to become perpetrators or victims”¹²³ of family violence.

Notes on contributor

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¹²³ Ibid.